Supreme Court, U.S.

(1)

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In The

Supreme Court of the United States

October Term, 1996

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN,

Petitioner,

vs.

KENNETH R., by his mother and natural guardian, DIANA R., KEVIN R., by his mother and natural guardian, DIANA R., BERNARD R., by his mother and natural guardian, LOURDES R., DIANA R. and LOURDES R. (anonymous),

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An employer is liable for negligently supervising it's employee if it knows or should know the employee poses a danger to third parties and it fails to exercise that degree of supervision which a reasonable employer would under the circumstances. Do negligent supervision claims require an individualized assessment of the degree of supervision exercised so as to require an exemption for religious supervision of clergy?

In negligent supervision claims, the parties are generally entitled to offer evidence that the employer complied with or violated its internal rules and regulations, that the employer's degree of supervision was similar to or varied from that of other employers in the industry, as well as the process by which information about the employee was evaluated. Do claims for negligent supervision of clergy require courts to pass upon matters of religious doctrine and governance?

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose order is sought to be reviewed here appear in the caption of the case except defendant Enrique Diaz Jimenez. Father Diaz has never appeared in the action and Respondents have entered a default judgment against him. There is no parent or subsidiary company of any party listed.

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Petitioner, The Roman Catholic Diocese of Brooklyn, respectfully petitions for a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Department.

OPINIONS BELOW

The opinion of the Appellate Division, Second Department, is reported at 229 A.D. 2d 159, 654 N.Y.S. 2d 791 and is reproduced in Appendix A filed herewith at p. 1a. The unreported decisions of the Supreme Court and the Appellate Division are reproduced in Appendices B and C respectively, filed herewith at pp. 12a and 17a.

STATEMENT OF JURISDICTION

The Appellate Division, Second Department denied Petitioner leave to appeal to the Court of Appeals on June 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

STATEMENT OF THE CASE

A claim for negligent supervision requires the trier of fact to decide whether the employer knew or reasonably should have known that it's employee posed a danger to third parties, whether the employer failed to exercise adequate supervision of it's

employee given this knowledge, and whether the plaintiff was injured as a result of the danger posed. In the case at bar, Respondents would have to show that the church had, or should have discovered, information from which a reasonable person would conclude Father Diaz was likely to sexually abuse third parties, that the church failed to adequately supervise Father Diaz in light of this knowledge, and that Respondents were sexually abused by Father Diaz. The Diocese respectfully submits that only the third question can be decided by a secular court without violating the First Amendment of the Constitution. Therefore, this Court should find that claims for negligence in the supervision of clergy are unconstitutional.

STATEMENT OF FACTS

In the present action, Respondents seek damages for injuries the infant Respondents suffered as a result of alleged sexual abuse at the hands of defendant Enrique Diaz Jimenez. Father Diaz was a Venezuelan priest who sought a position in the Diocese while he was attending St. John's University in Queens, New York. At the request of Monsignor Barretta of St. Leo's Church, Father Diaz was given a position in that parish beginning in October 1983. Father Diaz served as a parish priest at St. Leo's ministering to the Spanish speaking parishioners until October 1984, and again from October 1985 to October 1986. Respondents claim that Father Diaz sexually molested the infant Respondents at various times starting in July 1983, before Father Diaz's employment in October 1983, and ending in August 1989, long after his last employment in 1986.

Respondents claim that the Diocese is liable for their injuries because it was, *inter alia*, negligent in supervising Father Diaz while he was employed as a priest. In their bill of particulars, Respondents alleged that the Diocese was negligent in failing to have "proper and effective procedures for preventing

further acts [of sexual abuse] in the event that any do occur," and in continuing to employ Father Diaz after "it knew or should have known that he had in fact engaged in sexual acts with minors . . ." (R 122). Respondents alleged that actual and constructive notice of Father Diaz's sexual abuse "was given to the defendant DIOCESE through statements made by the infant Respondents to priests at St. Leo's Church and at Our Lady of Sorrows Church both in Queens, N.Y." and "through the defendant JIMENEZ as agent and employee of the church." (R 128–129). Respondents admit, however, that no one other than Father Diaz and the infant Respondents were ever present when any alleged abuse took place. (R 121).

PRIOR PROCEEDINGS

The Diocese moved to dismiss Respondents' complaint on the grounds that the claims against the Diocese violated the First Amendment of the Constitution in that they would infringe upon the Diocese's right to practice its religion, would require the trier of fact to decide matters of religious doctrine and governance, and would excessively entangle the court in matters of religion. The trial court sustained Respondents' claims for negligent hiring and supervision, finding that the tortious acts of Father Diaz were not protected by the First Amendment and concluding that therefore, "claims based upon the alleged negligent hiring, testing, supervision, and evaluation of" Father Diaz were constitutional. (15a).

On appeal, the Appellate Division sustained the legal sufficiency of Respondents' fourth and ninth causes of action.[1] (11a). The fourth cause of action alleged that the Diocese's actual or constructive knowledge that Father Diaz was "a sexual deviant who was attracted to and who engaged in sexual acts with

1. The Appellate Division dismissed Respondents' negligent hiring claim and the supreme court had already dismissed Respondents' other claims.

minors" gave rise to legal duty to protect Respondents from Father Diaz. (R 24). The ninth cause of action alleged that the Diocese "negligently retained and failed to properly supervise and monitor the activities of" Father Diaz. (R 25). The Appellate Division denied the Diocese's motion for leave to appeal to the Court of Appeals by order dated June 4, 1997. (17a-18a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to resolve a split among federal and state courts nationwide on the important question of whether, consistent with the First Amendment, a secular court can find a religious entity liable for negligently supervising its clergy. Resolving this important constitutional issue will turn upon whether common law rules of negligence are "neutral laws of general applicability" and whether decisions concerning the supervision of clergy can be fairly decided without passing upon matter of religious doctrine and governance.

The issues presented in this case are important to every religious entity which has clergy. If churches can be held liable for failing to exercise reasonable care in supervising their clergy, they will be forced to apply not only the religious rules called for by religious doctrine, but also secular criteria necessary to avoid liability. By definition, this infringes upon a church's practice of it's religion since it compels the church to interact with clergy in ways not required by religious doctrine. Moreover, whenever the application of religious criteria and rules produces a different result than the application of "reasonable care", the individual clergy's right to practice religion may be abridged. Requiring churches and synagogues to apply secular criteria in retaining and supervising clergy will also give rise to an entirely new class of litigation — wrongful discharge of clergy. Finally, assuming these claims violate the constitutional rights of religious entities, they have no adequate

remedy for such violations. Therefore, the writ should be granted.

There are now a number of state appellate court cases, including decisions from the highest courts of Colorado,[2] Ohio,[3] Oklahoma,[4] and Wisconsin,[5] which have reached conflicting decisions on whether, and under what circumstances, a church can be liable for negligently hiring or supervising its clergy. Those courts that have found negligent hiring or supervision claims constitutional have concluded that such claims can be decided upon "neutral principles of law". Those courts that have found negligent hiring or supervision claims unconstitutional have concluded that such claims require courts to pass upon questions of religious governance and doctrine. None of them have decided or discussed whether common law negligence rules are neutral laws of general applicability.

The Appellate Division's decision in the present case contributes yet another twist to the issue. Unlike the motion

2. *See Destefano v. Grabrian*, 763 P.2d 275, 287-288 (Colo. 1988)(diocese may be liable for failure to supervise priest who engaged in sexual relations with parishioner during marital counseling); *Moses v. Diocese of Colorado*, 863 P.2d 310, 320–321 (Colo. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 2153 (1994)(sustaining negligent hiring claim relying upon *DeStefano*)

3. *See Byrd v. Faber*, 565 N.E. 2d 584 (Ohio 1991)(church may be liable for negligent hiring).

4. *See Guinn v. The Church of Christ of Collinsville*, 775 P.2d 766, 783-785 (Okla. 1989)(upholding jury verdict against church for publication of private facts about former member by church's elders).

5. See *L.L.N. v. Clauder*, 563 N.W. 2d 434 (Wis. 1997); *Pritzlaff v. Archdiocese of Milwaukee*, 533 N.W. 2d 780, 789–791 (Wis. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 920 (1996).

court and Colorado's courts, the Appellate Division correctly ruled that the acts of the Diocese, not Father Diaz's acts were in issue. Yet, although it acknowledged that "[o]rdination to the priesthood confers a religious, not legal status, and may be characterized as a 'quintessentially religious' matter," it nevertheless rejected the notion that "requiring increased supervision of Jimenez or the termination of his employment by the [Diocese] would violate any religious doctrine or inhibit any religious practice". (6a, 9a)

Moreover, the Appellate Division erred in refusing to apply the compelling interest test since common law negligence claims require an individualized assessment of the reasons for the conduct undertaken. Indeed, instead of analyzing the Diocese's arguments that negligence claims are neither neutral nor generally applicable, the court simply deemed that common law rules of negligence are neutral and generally applicable. (9a)

Finally, if a claim that a church negligently supervised its clergy is an unconstitutional infringement upon the church's First Amendment rights, the church suffers a continuing violation of its rights whenever it is sued for such claims. The Diocese respectfully submits that churches have no adequate remedy for such violations of their constitutional rights. Therefore, a writ should be granted to resolve the issue.

I.

PLAINTIFFS' NEGLIGENT SUPERVISION CLAIM IS NEITHER NEUTRAL NOR GENERALLY APPLICABLE.

This Court has held that facially neutral laws of general applicability do not violate the free exercise clause.[6] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[7] however, this Court reasoned that where the law requires " 'individualized governmental assessment of the reasons for the relevant conduct,' " the absence of a religious exemption must be justified by a compelling state interest. The Diocese respectfully submits that common law negligence rules are not neutral generally applicable laws because they require an individualized assessment of the facts and circumstances to determine whether supervision was reasonable.

As this Court noted in *Smith*, the compelling interest test "was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."[8] Whether an employer exercised reasonable care in supervising an employee requires an analogous particularized assessment of the employer's reasons for the degree of supervision it exercised.

In the course of such an assessment, the employer is generally permitted to show the process by which it assessed the nature and extent of any danger posed by the employee,

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6. *See Employment Div. v. Smith*, 494 U.S. 872, 878 (1990).

7. 508 U.S. 520 (1993).

8. 494 U.S. at 884.

including assessments of the employee's character and reputation. In the case of clergy, however, such an assessment would necessarily be colored by religious belief because the religious nature of the calling.

A religion's doctrines and beliefs will necessarily be woven into a religion's practices and procedures for supervising clergy because clergy serve a purely religious function. Thus, unless the trier of fact assumes the validity of the beliefs upon which the practice is based, no fair assessment of the reasonableness of the conduct can be reached.

Priests, for instance, take vows of celibacy. If a jury is permitted to pass upon whether the church was reasonable in relying upon this vow in assessing the danger posed by a priest, it must pass upon the power of that vow. If the jury is not permitted to consider the church's reliance on the vow, the church is deprived of relevant and material evidence in support of the reasonableness of its supervision. In either case, a fair assessment is constitutionally impossible.

Similarly, the redemptive power of prayer and of confession and absolution are articles of faith in the Roman Catholic Church. If one believes in the power of confession, it might be reasonable to believe that because a priest has confessed to past sexual abuse and renewed his vow of celibacy, no further action is necessary. If one does not so believe, the mere suggestion might be conclusive proof of negligence. The Diocese respectfully submits that because negligent supervision claims require an individualized assessment of its reasons for supervising a priest in a particular manner, such claims violate it's constitutional right to practice religion.

II.

PLAINTIFFS' NEGLIGENT SUPERVISION CLAIMS WILL REQUIRE A JURY TO DECIDE WHETHER THE CHURCH COMPLIED WITH ITS PROCEDURES.

In the case at bar, plaintiffs' pleadings allege that the Diocese was negligent in failing comply with Canon Law in supervising Father Diaz. More generally, whether an employer violated its own internal rules regarding supervision or whether the employer's degree of supervision varied from the supervision exercised by other employers in the industry, is admissible evidence in negligent supervision claims. When the employer is a church, however, this evidentiary rule violates constitutional rights.

A civil court may not decide the propriety of a church's religious determinations, nor may it decide whether a church employed proper religious practices and procedures in reaching its determinations.[9] In *Serbian Eastern Orthodox Diocese v. Milovojevich*, the courts of Illinois resolved a dispute over church property by purporting to resolve a religious dispute over whether a Bishop had been properly defrocked.[10] This Court reversed, reasoning that courts may not adjudicate matters of "church polity and church administration," since to do so would violate the First Amendment's prohibition against resolving questions of religious doctrine.[11] This Court ruled that courts may not inquire into the validity of church proceedings, since

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9. *See Serbian Eastern Orthodox Diocese v. Milovojevich*, 426 U.S. 696 (1976); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

10. 426 U.S. at 708.

11. *Id.* at 710.

"an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations," is an unconstitutional intrusion upon the church's First Amendment rights.[12]

Plaintiffs' main theory of liability is rooted in religious doctrine and governance. Plaintiffs contend that since every priest is endowed with "powers and authority," by virtue of his office, the Diocese has a corresponding duty to exercise reasonable care in its supervision and hiring of clergy. In order to assess the "powers and authority" which flow from the status of being a priest, however, the court and the jury would have to interpret a religion's doctrine and principles of governance in violation of the First Amendment rights of the church.

More generally, evidence that would be material and relevant to any negligent supervision claim would also violate a church's constitutional rights. Plaintiffs could not prove negligence by showing that a church failed to abide by its own internal rules and procedures. Nor could there be proof that the rules and procedures of a church were similar to or different from the rules and procedures of other churches.

Moreover, any duty to exercise reasonable care in hiring and supervising clergy based upon their trusted status impinges upon the privacy and free exercise rights of clergy.[13] In *Bishop of San Diego*, plaintiff claimed she had been molested by a priest and that the diocese was liable because it had a duty to inquire about any prospective priest's sexual history. Plaintiff also contended that the church had a duty to supervise priests "because it places them in a unique position of trust and

12. *Id.* at 713.

13. *See Roman Catholic Bishop of San Diego v. Superior Court*, 42 Cal. App. 4th 1556, __, 50 Cal. Rptr. 399, __ (Ct. App. 1996).

confidence" and argued that the duty to supervise extends to sexual conduct because priests take a vow of celibacy.[14] The California Court of Appeals dismissed plaintiff's complaint against the church.

The Court noted that the vow of celibacy, which plaintiff claimed lulled her into a false sense of security, was a religious belief which "does not create a civil duty."[15] The Court reasoned that recognizing plaintiff's supervision claim would, in effect, "compel affirmation of a religious belief" in violation of a priest's free exercise rights.[16] The Court also reasoned that plaintiff's hiring claim should not be recognized since to do so would require the church to engage in inquiries which might violate a priest's right to privacy.[17]

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14. 42 Cal. App. 4th at __, 50 Cal. Rptr. at __.

15. 42 Cal. App. 4th at __, 50 Cal. Rptr. at __.

16. 42 Cal. App. 4th at __, 50 Cal. Rptr. at __.

17. 42 Cal. App. 4th at __, 50 Cal. Rptr. at __.

CONCLUSION

Plaintiffs' claims in this cases infringe upon the Diocese's First Amendment rights by imposing liability for violating church procedure and practice and by requiring the Diocese to adopt secular employment practices for purely religious personnel. Because these claims present important constitutional issues upon which the courts of several states have disagreed, the Diocese respectfully requests that the writ be granted.

Respectfully submitted,

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APPENDIX A — DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED MARCH 3, 1997

[654 N.Y.S.2d 791]

KENNETH R. et al., Respondents, v ROMAN CATHOLIC DIOCESE OF BROOKLYN, Appellant, et al., Defendant.

Second Department, March 3, 1997

SUMMARY

APPEAL from so much of an order of the Supreme Court (James H. Shaw, J.), entered December 11, 1995 in Kings County, as, in an action to recover damages, *inter alia*, for the negligent hiring, supervision, and retention of a priest who was employed by defendant Catholic Diocese, denied those branches of defendant's cross motion pursuant to CPLR 3211(a)(7) to dismiss the fourth, fifth, sixth, seventh, eighth, ninth, and eleventh causes of action of the amended complaint sounding, *inter alia,* in negligent hiring, negligent retention, and negligent supervision.

HEADNOTES

Negligence — Negligent Hiring — Liability of Catholic Diocese for Acts of Sexual Abuse Committed by Priest — Freedom of Religion

1. Defendant Roman Catholic Diocese may not be held vicariously liable under the theory of negligent hiring for the acts of sexual abuse committed against the infant plaintiffs by a priest who was ordained in Venezuela in 1977 and came to the Diocese in 1983 with a letter of reference. Under these

circumstances, defendant was not responsible for the codefendant priest's ordination and, irrespective of whether liability could ever be imposed for ordination to the priesthood without violating the constitutional or statutory guarantees of free exercise of religion and separation of church and State, the causes of action alleging that defendant failed to screen or determine the codefendant's fitness for the priesthood must be dismissed. Similarly, the cause of action alleging that defendant should have initiated some investigations of the codefendant priest before hiring him to work in a church under its control must also be dismissed. The documentary evidence in the record establishes that defendant did not and could not have known of the codefendant's propensities to sexually abuse children when he arrived from Venezuela with a letter of reference. Since defendant had no reason to believe that there was any problem, it cannot be charged with negligence for failing to investigate further. Moreover, imposing a special duty to inquire as to backgrounds of priests as a class has no legal basis, and carries with it discriminatory overtones against individuals merely because they have been ordained to the priesthood.

Negligence — Negligent Supervision and Retention — Liability of Catholic Diocese for Acts of Sexual Abuse Committed by Priest — Freedom of Religion

2. Although defendant Roman Catholic Diocese may not be held vicariously liable under the theory of negligent hiring for the acts of sexual abuse committed by one of its ordained priests, it may, however, be held liable for negligent retention and supervision if it acquired actual or constructive knowledge of the codefendant priest's propensity to sexually abuse children. Imposition of liability under such circumstances would not violate constitutional or statutory guarantees of free exercise of

religion and separation of church and State. There is no indication that requiring increased supervision of the codefendant priest or the termination of his employment based upon his conduct would violate any religious doctrine or inhibit any religious practice. Furthermore, the Religious Freedom Restoration Act of 1993, which provides that if a law of general applicability substantially burdens the free exercise of religion, such application must be in furtherance of a compelling State interest and must constitute "The least restrictive means of furthering that compelling governmental interest" (42 USC § 2000bb-1 [b] [2], is inapplicable since there is no indication that the level of supervision exercised over the codefendant priest, or his retention in the Diocese's employ, was dictated by any religious doctrine. Moreover, while the First Amendment to the United States Constitution prohibits regulation of religious beliefs, conduct by a religious entity remains subject to regulation for the protection of society. Religious entities have some duty to prevent injuries inflicted by persons in their employ whom they have reason to believe will engage in injurious conduct. Accordingly, plaintiffs' causes of action sounding in negligent supervision and retention are sufficient to withstand a motion to dismiss the complaint.

* * *

APPEARANCES OF COUNSEL

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Kenneth Litwack, Bayside (*Robert Litwack* of counsel), for respondents.

Appendix A

OPINION OF THE COURT

GOLDSTEIN, J.

At issue here is whether the plaintiffs have stated causes of action against the appellant Roman Catholic Diocese of Brooklyn sounding in negligent hiring, negligent retention, and negligent supervision. We find that their allegations with respect to negligent retention and negligent supervision are sufficient to withstand the appellant's cross motion to dismiss the complaint pursuant to CPLR 3211(a)(7), but that they do not have a cause of action to recover damages for negligent hiring.

The plaintiffs' amended complaint alleges that, "on or about or between July 13, 1983, and August 31, 1989", the appellant's codefendant, Enrique Diaz Jimenez, an ordained Roman Catholic priest, sexually abused the infant plaintiffs. Enrique Diaz Jiminez pleaded guilty to sexual abuse in the third degree based upon this conduct. However, as noted by the Supreme Court, that conduct did not fall within the scope of his employment and therefore the appellant is not vicariously liable for his conduct under the theory of respondeat superior (*see, Cornell v State of New York,* 46 NY2d 1032; *Mercer v State of New York.* 125 AD2d 376). Consequently, the Supreme Court granted those branches of the appellant's cross motion which were to dismiss the first and second causes of action insofar as asserted against it. The Supreme Court also dismissed the plaintiffs' third cause of action sounding in clergy malpractice, and their tenth cause of action alleging that the appellant created a "climate and custom" of indifference to sexual abuse. Those rulings are not before us on this appeal.

In instances where an employer cannot be held vicariously

liable for its employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision (*see, Hall v Smathers,* 240 NY 486; Restatement [Second] of Torts § 317. However, a necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury (*see, e.g., Park v New York Cent. & Hudson Riv. R. R. Co.,* 155 NY 215; *Gallo v Dugan,* 228 AD2d 376; *Mataxas v North Shore Univ. Hosp.,* 211 AD2d 762; *Detone v Bullit Courier Serv.,* 140 AD2d 278; *Di Cosala v Kay,* 91 NJ 159, 450 A2d 508; Restatement [Second] of Agency § 213, comment *d).*

When considering an application to dismiss a cause of action pursuant to CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg,* 43 NY2d 268, 275; *see, Leon v Martinez,* 84 NY2d 83; *Rovello v Orofino Realty Co.,* 40 NY2d 633, 636). Generally, such a determination can be made from the factual allegations in the four corners of the complaint (*see, Guggenheimer v Ginzburg, supra,* at 275; *Foley v D'Agostino,* 21 AD2d 60, 64-65. Evidentiary material may be considered to "remedy defects in the complaint" (*Rovello v Orofino Realty Co., supra,* at 636), "and, unless it has been shown that a material fact as claimed by the pleader to be on is not a fact at all and unless it can be said that no significant dispute exists regarding it", dismissal may not be predicated on such evidentiary material (*Guggenheimer v Ginzburg, supra,* at 275).

There is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity (*see, Jones v Trane,* 153

Misc 2d 822, 831; *cf.*, CPLR 3016; *Byrd v Faber,* 57 Ohio St 3d 56, 61, 565 NE2d 584, 589). However, a complaint which contains bare legal conclusions and/or factual claims which are "flatly contradicted by documentary evidence" should be dismissed pursuant to CPLR 3211(a)(7) *(Corporate Natl. Realty v Philson Ltd.,* __ AD2d __, __, 1996 NY Slip OP 09496 [2d Dept, Oct. 21, 1996]; *see, e.g., Doria v Masucci,* 230 AD2d __, 1996 NY Slip Op 07469 [2d Dept, Aug. 12, 1996]; *Lovisa Constr. Co. v Metropolitan Transp. Auth.,* 198 AD2d 333).

The plaintiffs' amended complaint alleges that the appellant "had prior knowledge or should have known that the defendant Jimenez was a sexual deviant" and therefore was negligent in hiring, supervising, and retaining him. The plaintiffs further contend that the appellant failed to "establish proper guidelines and procedures", failed to "properly screen and hire applicants to the priesthood", and "failed to have Defendant Jimenez examined psychiatrically and/or psychologically to determine his fitness for serving in the capacity as a Roman Catholic priest".

Certain undisputed facts emerge from the documentary evidence in the record. The codefendant Jimenez was ordained a Roman Catholic priest in 1977, in Venezuela. He came to Roman Catholic Diocese of Brooklyn in 1983, with a letter of reference from the Archbishop of Merida, Venezuela, and was assigned to work in St. Leo's Church.

Ordination to the priesthood confers a religious, not legal status, and may be characterized as a "quintessentially religious" matter (*Serbian Orthodox Diocese v Milivojevich,* 426 US 696, 720). Imposing liability for conferring that status would create serious concerns of excessive entanglement in religious affairs,

in violation of the First Amendment of the United States Constitution (*see, Pritzlaff v Archdiocese of Milwaukee,* 194 Wis 2d 302, 327, 533 NW2d 780, 790, *cert denied* __ US __, 116 S. Ct. 920; *see also, Rayburn v General Conference of Seventh-day Adventists,* 772 F2d 1164, *cert denied* 478 US 1020; *Downs v Roman Catholic Archbishop of Baltimore,* 111 Md App 616, 683 A2d 808).

However, the question of whether liability could ever be imposed for ordination to the priesthood need not be determined here since the only entity of the Roman Catholic Church sued by the plaintiffs is the appellant Roman Catholic Diocese of Brooklyn which the amended complaint alleges "is a corporation duly licensed to do business in the State of New York". Thus, pursuant to the allegations in the amended complaint, the appellant is a separate entity (*see generally, Heenan v Roman Catholic Diocese,* 158 AD2d 587). The plaintiffs assert no facts from which one could infer that the appellant was responsible for Jimenez's status as a Roman Catholic priest, since he was ordained in Venezuela by officials of the diocese there. Accordingly, the fifth and eighth causes of action, alleging that the appellant failed to screen or determine Jimenez's fitness for the priesthood, must be dismissed.

With respect to negligent hiring, the documentary evidence in the record establishes that the appellant did not and could not have known of Jimenez's propensities when he arrived here from Venezuela with a letter of reference. The plaintiffs allege that the appellant should have initiated some investigations of Jimenez before hiring him to work in a church under its control. The question of whether there is such a common-law duty is a question of law for the courts (*see, D'Amico v Christie,* 71 NY2d 76; *Eiseman v State of New York,* 70 NY2d 175, 190).

Appendix A

There is no common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee (*see, Ford v Gildin,* 200 AD2d 224, 226-227; *Stevens v Lankard,* 31 AD2d 602, *affd* 25 NY2d 640; *Amendolara v Macy's N.Y.,* 19 AD2d 702; *cf., Rhames v Supermarkets Gen. Corp.,* 230 AD2d __, 1996 NY Slip Op 07515 [2d Dept, Aug. 12, 1996]). Since Jimenez came to the appellant with a letter of reference from his Archbishop, which gave the appellant no reason to believe there was any problem, the appellant cannot be charged with negligence for failing to investigate further *(see, Lopez v Burns Intl. Detective Agency,* 48 AD2d 645; *Roman Catholic Bishop of San Diego v Superior Ct.,* 42 Cal App 4th 1556, 50 Cal Rptr 2d 399; *Kennedy v Roman Catholic Diocese,* 921 F. Supp 231).* Accordingly, the plaintiffs' sixth cause of action, alleging "failure to establish proper guidelines and procedures", and the plaintiffs' seventh cause of action, alleging that the appellant "was negligent in hiring Jimenez", must be dismissed.

In their bill of particulars, the plaintiffs allege that the appellant acquired actual or constructive notice of the codefendant Jimenez's propensity to sexually abuse children from "statements made by the infant plaintiffs to priests at St. Leo's Church and Our Lady of Sorrows Church", and from the codefendant Jimenez himself. Allegations in a "bill of particulars

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* The plaintiffs allege in their bill of particulars that certain unspecified "studies" have been published "showing the existence of ongoing problems in the priesthood relating to sexual activity with children thereby raising a duty to inquire". However, imposing a special duty to inquire as to backgrounds of priests as a class has no legal basis, and carries with it discriminatory overtones against individuals merely because they have been ordained to the priesthood (*see generally, McDaniel v. Paty,* 435 US 618).

are to be taken into account in considering the sufficiency of the challenged causes of action" (*Moore v Johnson,* 147 AD2d 621; *see, Nader v General Motors Corp.,* 25 NY2d 560, 565). If, as the plaintiffs allege in their bill of particulars, the infant plaintiffs and/or Jiminez himself made statements to other priests at St. Leo's Church or Our Lady of Sorrows Church giving them notice of Jimenez's conduct, the plaintiffs may have causes of action sounding in negligent retention and negligent supervision. Pursuant to prevailing case law, as a general rule, imposition of such liability would not violate constitutional and statutory guarantees of free exercise of religion and separation of church and State.

It is well settled that generally, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice" (*Church of Lukumi Babalu Aye v City of Hialeah,* 508 US 520, 531; *see, Employment Div. v Smith,* 494 US 872). Some cases have indicated that the First Amendment to the United States Constitution may be asserted as a defense if the defendant's conduct that caused the plaintiff's injury finds its basis in religious beliefs and practices (*see, Wisconsin v Yoder,* 406 US 205, 215-216; *Konkle v Henson,* 672 NE2d 450 [Ind App]; *Destefano v Gabrian,* 763 P2d 275, 283 [Colo]). Here, however, there is no indication that requiring increased supervision of Jimenez or the termination of his employment by the appellant based upon Jimenez's conduct would violate any religious doctrine or inhibit any religious practice (*see, Swaggart Ministries v Board of Equalization,* 493 US 378; *L.L. N. v Clauder,* 203 Wis 2d 570, 552 NW2d 879).

The enactment of the Religious Freedom Restoration Act of 1993 (42 USC § 2000bb *et seq.*) does not alter this analysis.

That statute provides that if a law of general applicability substantially burdens the exercise of religion, such application must be in furtherance of a compelling State interest and must constitute "the least restrictive means of furthering that compelling governmental interest" (42 USC § 2000bb-1 [b] [2]). However, that statute only applies if the free exercise of religion is " 'substantially' burdened" (*Geisindky v Village of Kings Point*, 226 AD2d 340, 341) because the activities in question are motivated by religious beliefs (*see, Mack v O'Leary*, 80 F3d 1175, 1178; *Bryant v Gomez*, 46 F3d 948, 949; *Matter of Salahuddin v Coughlin*, 222 AD2d 950, *cert denied* __ US __, 117 S Ct 317). As previously noted, there is no indication that the level of supervision exercised over Jimenez, or his retention in the appellant's employ, was dictated by any religious doctrine. Indeed, it appears from the record that Jimenez's employment relationship with the appellant was ultimately terminated, and his requests for additional employment were denied (*cf., Schmidt v Bishop*, 779 F Supp 321, 331).

Moreover, while the First Amendment to the United States Constitution prohibits regulation of religious beliefs, *conduct* by a religious entity "remains subject to regulation for the protection of society" (*Cantwell v Connecticut*, 310 US 296, 304; *see, Employment Div. v Smith*, 494 US 872, *supra; Destefano v Grabrian*, 763 P2d 275, 283, *supra*). The First Amendment does not grant religious organizations absolute immunity from tort liability (*see, Konkle v Henson*, 672 NE2d 450, 456; *supra; Moses v Diocese of Colo.*, 863 P2d 310, 319 [Colo]). Therefore, religious entities must be held accountable for their actions, "even if that conduct is carried out as part of the church's religious practices" (*Meroni v Holy Spirit Assn. for Unification of World Christianity*, 119 AD2d 200, 203). Religious entities have some duty to prevent injuries inflicted

by persons in their employ whom they have reason to believe will engage in injurious conduct (*see, Konkle v Henson, supra,* at 456; *L.L.N. v Clauder,* 203 Wis 2d 570, 552 NW2d 879, *supra; Erickson v Christenson,* 99 Ore App 104, 109, 781 P2d 383, 386-387; *Gallas v Greek Orthodox Archdiocese,* 154 Misc 2d 494, 499-500; *Jones v Trane,* 153 Misc 2d 822, 830-831, *supra*).

Therefore, the plaintiffs' fourth and ninth causes of action, sounding in negligent supervision and retention, and the eleventh cause of action, asserting a derivative claim, are sufficient to withstand a motion to dismiss the complaint pursuant to CPLR 3211.

Accordingly, the order should be modified, on the law, by deleting the provisions thereof which denied those branches of the appellant's cross motion which were to dismiss the fifth, sixth, seventh, and eighth causes of action, and substituting therefor provisions granting those branches of the cross motion.

MILLER, J.P., JOY and ALTMAN, JJ., concur.

Ordered that the order is modified, on the law, by deleting the provisions thereof which denied those branches of the appellant's cross motion which were to dismiss the fifth, sixth, seventh, and eighth causes of action, and substituting therefor provisions granting those branches of the cross motion; as so modified, the order is affirmed, insofar as appealed from, without costs or disbursements.

APPENDIX B — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS DATED DECEMBER 11, 1995

At an IAS Term, Part 12 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of December, 1995

PRESENT:

HON. JAMES H. SHAW, JR.

Justice.

Index No. 20178/90

KENNETH ROSA, by his mother and natural guardian DIANA ROSA, KEVIN ROSA, by his mother and natural guardian DIANA ROSA, BERNARD ROSA, by his mother and natural guardian, LOURDES ROSA, DIANA ROSA, and LOURDES ROSA,

Plaintiffs,

-against-

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN and ENRIQUE DIAZ JIMENEZ,

Defendants.

The following papers numbered 1 to 10 read on this motion:

Appendix B

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed 1,2,3,4

Opposing Affidavits (Affirmations) 5,6,7,10

Reply Affidavits (Affirmations) 8,9

* * *

Upon the foregoing papers, the motion by plaintiffs for an order "to deem issues resolved" (essentially, for an order of preclusion), the motion by plaintiffs for an order imposing sanctions upon the attorneys for defendant Roman Catholic Diocese of Brooklyn ("Diocese"), the cross motion by said defendant for an order imposing sanctions against plaintiffs' attorney, and the cross motion by said defendant for an order dismissing plaintiffs' complaint, pursuant to CPLR 3211(a)(7), are consolidated for decision herein and, upon consolidation, the motions and cross motions are denied, except to the extent of dismissing the first, second, third, and tenth causes of action.

Plaintiffs, as parents and natural guardians of several children, allege that a priest assaulted three of them. As a result of such misconduct, plaintiffs assert eleven causes of action, including claims for assault, intentional infliction of emotional distress, clergy malpractice, and negligence.

In its cross motion seeking dismissal of the complaint, defendant Diocese contends that all of plaintiffs' claims against it must be dismissed either because liability may not be imposed

under the doctrine of respondeat superior or because such claims would require a definition of a standard of care for the clergy which would run afoul of the prohibition against excessive entanglement in religion inherent in the First Amendment of the United States Constitution.

An employer may be liable for the acts of an employee, whether negligent or intentional, if the acts complained of are within the scope of employment and in furtherance of the employer's business (*Noto v. St. Vincent's Hosp. & Med. Ctr.*, 160 AD2d 656, 656-57, *lv denied* 76 NY2d 714). In this case, however, the alleged assault was not within the scope of employment and cannot be said to have been in furtherance of the employer's business (*see, Joshua S. v. Casey*, 206 AD2d 839). Accordingly, the first and second causes of action — alleging liability under the doctrine of respondeat superior — must be dismissed. Further, the court is unaware of any authority supporting the proposition advanced by plaintiffs that sexual abuse by a member of the clergy is cognizable as "clergy malpractice." Therefore, plaintiffs' third cause of action must also be dismissed (*see, Joshua S. v. Casey, supra*).

In plaintiffs' tenth cause of action they allege that the Diocese "was indifferent to a known pattern of sexual misconduct by certain priests under its control" and that such indifference created "a climate" which proximately caused the assaults herein. A claim predicate upon "indifference" (especially to the alleged conduct of individuals other than defendant Enrique Diaz Jimenez) does not strike this court as viable. It is likewise dismissed.

With respect to the remaining causes of action, as the court noted in *Jones v. Trane* (153 Misc 2d 822), there is obviously

no suggestion that the misconduct alleged is a part of the tenets and practices of the Roman Catholic Church or that restraint on it by the imposition of civil liability would in any way intrude on the free exercise of religion to an extent protected by the First Amendment. In view of the allegations of both actual and constructive notice that are set out in the complaint, it would be inappropriate at this juncture to dismiss plaintiffs' claims based upon the alleged negligent hiring, testing, supervision, and evaluation of Enrique Diaz Jimenez. Consequently, with respect to the remaining causes of action, the cross motion by defendant Diocese is denied.

In their motion and cross motion seeking various sanctions because of the Diocese's alleged failure to respond to discovery demands, plaintiffs argue that said defendant's attorneys have "engaged in a pattern of deception, delay and harassment" to thwart legitimate inquiry into the background of a wayward priest. In opposition to the motion and in its own cross motion seeking sanctions, defendant's attorneys contend that the Diocese has provided whatever documents are in its possession and that plaintiffs' attorney has cavalierly defamed them and their client.

Plaintiffs suggest that records may have been destroyed or may exist in Venezuela or may be maintained by two local parishes in Brooklyn. Firstly, there is no indication that records were destroyed and, in fact, canonical law cited by plaintiffs provides for destruction of certain records only after ten years has passed, which has not been the case. Secondly, even if relevant records exist in Venezuela (and there is no reference in the documents produced to any written memorandum), defendant obviously has no control over them. Lastly, while the local parishes may possess records to which plaintiffs would be

entitled (and which the Diocese may not, for some reason, have), the court notes that those parishes have been named as defendants in a related action and may themselves (within the context of that action) be required to produce them. The court also notes that many of the discovery requests by plaintiffs involve communications which may have been made subsequent to the filing of criminal charges and, therefore, they may not be discoverable.

After the passage of time that these motions and cross motions have unfortunately been pending, it is difficult to discern what pre-trial proceedings have transpired. Accordingly, this order is not meant to foreclose additional discovery demands, as long as they are material and relevant to the issues herein.

Defendant Diocese has provided both the court and plaintiffs with a lengthy compilation of all of the documents it possesses regarding defendant Enrique Diaz Jimenez. Such documents, which are incorporated in a "Response to Court Order of August 26, 1993" and an "Enrique Diaz Jimenez File For In Camera Review," include an affidavit by the Chancellor of the Diocese to the effect that "there are no other documents of any nature, relating to Father Diaz, maintained by the Diocese of Brooklyn which have not been produced." In the face of such a statement and the documents which have been proffered, the motions by plaintiffs must be denied.

Given the frustration encountered by plaintiffs in dealing with criminal charges, civil procedure, and ecclesiastical law, sanctions against them (or their attorney) are likewise unwarranted.

ENTER,
s/ James H. Shaw, Jr.
J.S.C.

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED JUNE 4, 1997

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

SONDRA MILLER, J.P.
DANIEL W. JOY
MYRIAM J. ALTMAN
GLORIA GOLDSTEIN, JJ.

96-00474

Kenneth R. (anonymous), et al.,

respondents,

v

Roman Catholic Diocese of Brooklyn, appellant, et al.,

defendant.

DECISION & ORDER ON MOTION

Motion by the appellant for reargument of an appeal from stated portions of an order of the Supreme Court, Kings County, dated December 11, 1995, which was determined by opinion and order of this court dated March 3, 1997, or, for leave to appeal to the Court of Appeals from the opinion and order of this court.

Appendix C

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

MILLER, J.P., JOY, ALTMAN and GOLDSTEIN, JJ., concur.

ENTER

Martin H. Brownstein
Clerk

June 4, 1997

Supreme Court, U.S.
FILED
OCT 9 1997
CLERK

No. 97-405

In The

Supreme Court of the United States

October Term, 1996

THE ROMAN CATHOLIC DIOCESE OF BROOKLYN,

Petitioner,

vs.

KENNETH R., by his mother and natural guardian, DIANA R., KEVIN R., by his mother and natural guardian, DIANA R., BERNARD R., by his mother and natural guardian, LOURDES R., DIANA R. and LOURDES R. (anonymous),

Respondents.

On a Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department.

RESPONDENTS' BRIEF IN OPPOSITION

KENNETH LITWACK
Counsel of Record
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Bayside, N.Y. 11361
(718) 428 4806

Counsel for Respondents

PARTIES TO THE PROCEEDING

The petition does not accurately list the parties to the proceeding. While only The Roman Catholic Diocese of Brooklyn has pursued an appeal, the proceeding in the lower court is a consolidated proceeding involving the following parties: plaintiffs-respondents as listed in the caption; The Roman Catholic Diocese of Brooklyn, *defendant-petitioner*, Our Lady of Sorrows Church, Inc., *defendant*, St. Leo's Church, Inc., *defendant*, The Roman Catholic Archdiocese of Merida, Venezuela, *defendant*, Baltazar Porras Cardoza, Archbishop of Merida, Venezuela, *defendant*. Both The Roman Catholic Archdiocese of Merida, Venezuela, and Baltazar Porras Cardoza, Archbishop of Merida, Venezuela have defaulted in the action. As petitioner noted in its list of parties defendant Enrique Diaz Jimenez has also defaulted.

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CONSTITUTIONAL PROVISIONS

U.S. Constitution First Amendment 1

STATEMENT OF THE CASE

This case involves questions about the negligence of the petitioner and others for their acts in supervising an employee. The employee was a priest who had transferred from a diocese in Venezuela to petitioner and had worked at churches in Queens, N.Y.

The priest, Enrique Diaz Jimenez, who has defaulted in this action, sexually abused three young boys, plaintiffs-respondents herein. The priest pleaded guilty to criminal charges of sexual abuse involving the three boys.

The priest had transferred to the Brooklyn Diocese from the Archdiocese of Merida, Venezuela. The Archdiocese of Merida and Baltazar Porras Cardoza, the Bishop of the Venezuelan Diocese have defaulted in the action. The Brooklyn Diocese did not ordain the priest in hiring him, *i.e.* it did not confer a religious status upon him in hiring him. The priest already was ordained before he transferred to Petitioner. Upon information and belief, the Brooklyn Diocese did not remove any religious status in denying him permanent employment in the diocese. Upon information and belief, the priest remained a priest after his criminal convictions and return to Venezuela.

Plaintiffs-Respondents commenced this action and defendant-petitioner moved for dismissal for failure to state a cause of action pursuant to NY Civil Practice Law and Rules 3211(a)(7) arguing that the First Amendment of the United States

Constitution precludes holding a religious institution liable in hiring and supervising its employees and that plaintiffs-respondents' *respondeat superior* theories had no application. The trial court rendered a decision which dismissed some of plaintiffs' causes of action but allowed plaintiffs to proceed on theories of negligent hiring, negligent supervision, negligent retention and the mothers' derivative claims.

Petitioner appealed to the Supreme Court of the State of New York, Appellate Division, Second Department seeking review of the trial court decision upon the Federal constitutional grounds stated above. The Appellate Division, Second Department dismissed plaintiffs' negligence in hiring theory on non-constitutional grounds, but upheld plaintiffs-respondents theories of negligent supervision, negligent retention and the derivative claims.

Petitioner moved in the Appellate Division for reargument and in the alternative for leave to appeal to the state high court, the Court of Appeals, on their stated constitutional grounds. Respondents also moved in the Appellate Division for reargument or leave to appeal to the Court of Appeals on other non-constitutional grounds relating to the dismissal of the negligence in hiring cause of action. Both motions were denied. Plaintiffs-respondents moved directly to the Court of Appeals for leave to appeal on the negligence in hiring theory dismissed by the Appellate Division on non-constitutional grounds. Defendant-petitioner opposed plaintiffs-respondents motion to the New York high court arguing that the appeal could not be

time because the Appellate Division order was not final in state law terms and therefore not ready for review by the Court of Appeals. Plaintiffs-respondents motion is still pending.

REASONS FOR DENYING THE WRIT

A. Petitioner has not exhausted its remedies in State court and the interlocutory order of the Appellate Division, Second Department is not final in State or Federal Terms.

The order appealed from is an interlocutory order by an intermediate state court and is not a "final" decision. While it is true that petitioner cannot *now* proceed with an appeal to the highest court in the state because the Appellate Division order is not final under New York law, petitioner can still seek state high court review of all the constitutional issues at a later stage of proceedings.[1]

The lack of finality in state law terms is extremely important in this instance because of the nature of the Appellate Division order and in light of the current stage of the trial

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[1] McKinney's Consol. Laws of New York Civil Practice Law and Rules 5601 (b) "**Constitutional Grounds.** An appeal may be taken to the court of appeals as of right: 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; ... (d) **Based upon nonfinal determination of the appellate division.** An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, ... or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination or award and which satisfies the requirements of ... paragraph one of subdivision (b) except that of finality."

proceedings. As was stated earlier, Petitioner's appeal arises from an order on its motion to dismiss plaintiffs' complaint for failure to state a cause of action. The Appellate Division order is a statement of first impression of New York common law and the ruling states that there is no broad constitutional impediment to proceeding upon a theories of negligent supervision and negligent retention. The ruling states that the defendant-petitioner does not have immunity from suit based upon the First Amendment. No New York court has yet applied this ruling to an actual trial or used it to decide upon any evidence. Petitioner's underlying pre-trial motion was made when only the most limited discovery had been had in this case. Thus this Court is being asked to decide the issues raised without any indication from the New York courts how this pre-trial, pre-deposition ruling will be applied and without any evidentiary presentation. And petitioner will have the opportunity to seek state high court review of all its constitutional issues, and any others which might arise at trial, when there is finality in state law terms.

As the order appealed from is not final and all petitioner's state high court avenues of review remain open, this case is not final in Federal terms either. *Missouri v K.I. Ry. Co. v City of Loathe,* 222 US 185 (1911); *Clark v City of Kansas City, Kan.*, 172 US 334 (1899); 28 U.S.C. 1257(a). Further, defendant-petitioner will have all the defenses available to it which are available to any other defendant in such a negligence case. *Pope, et. al. v Atlantic Coast Line*, 345 US 379 (1953).

Finally, petitioner will still have recourse to review by this Court when there is *finality* in the action. Petitioner's writ is a clear example of why there is a *finality* rule. After the matter has proceeded through state court it will be possible to see just what the state law means. At this juncture a court of review could only speculate on both the facts and the law of this case.

B. There is no conflict among the states on the question of the constitutionality of negligent supervision or retention.

The conflict among the states set forth by Petitioner is a chimera. Petitioner writes:

> There are now a number of state appellate court cases, including decisions from the highest courts of Colorado, Ohio, Oklahoma, and Wisconsin, which have reached conflicting decisions on whether, and under what circumstances, a church can be liable for negligently hiring or supervising its clergy. [Pet. 5]

First it should be noted that plaintiff-respondent has no remaining negligent hiring claim so the attempt to seek review based upon a perceived conflict among the states on negligent hiring of clergy issues is misplaced. The order appealed from did not reach the constitutional propriety of negligence in hiring of religious employees as it disposed of the negligence in hiring issue on other grounds. Second, on the issue of negligent supervision

petitioner cites six state cases none of which support its position. The Oklahoma Case cited[2] was an invasion of privacy case against the Elders of a church who continued a public campaign against the "sinfulness" of a former member even after that individual had left the church. That case was a Free Exercise case in which the Oklahoma Court rejected arguments that holding the Elders liable for their acts interfered with the Free Exercise of religion. The arguments presented by petitioner are not Free Exercise arguments, but instead are very different "excessive entanglement" arguments. The Oklahoma case has no relevance here. The Ohio case[3] dealt only with the issue of negligent hiring and imposed special pleading requirements in such cases and is also not relevant here. Again, Plaintiff-respondents have no negligence in hiring theory. The two Colorado cases cited[4] both allowed negligent supervision theories to proceed after review of the constitutional issues. In the two Wisconsin cases cited,[5] the Wisconsin Court did look upon negligent supervision against clergy with significantly greater skepticism than the did Colorado court, however, it did not set forth a *per se* rule barring such claims as violating the First Amendment. Instead the Wisconsin

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[2] *Guinn v The Church of Christ of Colinsville,* 775 P.2d 766 (Okla. 1989).

[3] *Byrd v Faber,* 565 N.E.2d 584 (Ohio 1991).

[4] *DeStefano v Grabrian,* 763 P.2d 275, 283-284 (Colo. 1988) and *Moses v Diocese of Colorado,* 863 P.2d 310, 320-321 (Colo. 1993).

[5] *L.L.N. v Clauder,* 563 N.W.2d 434 (Wis. 1997) and *Pritzlaff v Archdiocese of Milwaukee,* 533 N.W.2d 780 (Wis. 1995), *cert. den.*, __ U.S. __, 116 S.Ct. 920 (1996).

court granted summary judgment in each case on First Amendment grounds based upon the kind of inquiry which the evidence specifically before those courts would have required. Thus no court cited by petitioners has held that the legal theory of negligent supervision when applied to clergy is *barred* by the First Amendment.

The differences between what the Wisconsin court did and what petitioner seeks here are important. The Appellate Division order was made upon a motion to dismiss for failure to state a cause of action. Petitioner is not asking this Court to rule on the constitutionality of any particular evidence actually before the Court as was done by the Wisconsin court, but is instead asking this Court to rule broadly that *any* sort of proof plaintiffs-respondents might present poses an insurmountable First Amendment hurdle. Petitioner seeks a broad grant of immunity to religious institutions reaching far beyond the scope of the First Amendment.

And petitioner overreaches in its argument that plaintiffs-respondents "main theory of liability is rooted in religious doctrine and governance". [Pet. 10] Plaintiffs-respondents main theory is that petitioner had reason to know it had an active pedophile among its employees and that its actions led to the immediate harm of the plaintiffs-respondents. But these are arguments best left, in the first instance, to a trial court. And if reviewable constitutional infirmities were to arise in the trial petitioner could have those errors reviewed at the State court level and again at the Federal level.

Petitioner also cites a seventh case, one from California,[6] which is again a negligence in hiring case, and one which petitioner discusses in a manner which unfairly conflates arguments made by the California plaintiff with those of respondents. Respondents have never made arguments like those used in the California court. Further, to the extent that plaintiffs-respondents had tried to make "agency" and "scope of employment" arguments about the "powers" given to priests in support of their *respondeat superior* causes of action in the complaint, they are now irrelevant as those *respondeat superior* theories have already been rejected by the New York courts.

C. Plaintiffs-Respondents Negligent Supervision claim relies upon rules of law which are neutral and of general application.

As was noted early in this discussion, petitioner hired the wayward priest and effectively fired him without ever reaching any issues relating to whether or not he should be a priest. The priest in question was ordained in Venezuela and transferred to New York. Whether or not petitioner is liable for its acts in supervising its employee should rest upon the facts presented to a court and not the mere incantation of the obvious fact that petitioner is a religious institution. Not every decision a religious institution makes is based upon religion. And not every rule that a religious institution has involves a religious belief or practice.

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[6] *Roman Catholic Bishop of San Diego v Superior Court,* 50 Cal.Rptr. 399, 405-406 (Cal.App.4 Dist. 1996)

There are troubling implications to the kind of immunity petitioner seeks. If a church has two employees drive children on outings and both have accidents and both have similar known histories of alcohol problems then that church may well be liable for the accidents and injuries on grounds it negligent supervised its employees. But if one of those individuals is a clergyman and the other is a lay person, petitioner argues that even though both employees presented the same basic facts and circumstances, and both were subject to the same rules and law in the same way, the church should have immunity from suit on the clergyman.

Similarly, in a case of two pedophile teachers, with similar histories, teaching in adjacent classrooms in a religious school, petitioner wants immunity for the religious employer for its acts in relation to its clergyman. Surely neutral principals of law of general application can be applied in these instances without implicating the First Amendment. *Lemon v Kurtzman*, 403 US 602 (1971).

CONCLUSION

For all the reasons given above the petition should be denied.

Dated: October 9, 1997

Respectfully submitted,

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